IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 12, 2006 Session

IN RE: D.J.R.

Appeal from the Circuit Court for Stewart County
No. 4-653-CV-05 Robert Burch, Judge

No. M2005-02933-COA-R3-JV - Filed on January 30, 2007

The uncle and aunt of a child filed a dependent and neglect action in Juvenile Court seeking custody of the child. The Juvenile Court found the child dependent and neglected and awarded custody of the child to the uncle and aunt. The child's mother appealed. The Circuit Court affirmed, finding the existence of a substantial risk of harm if the child were to remain in his mother's custody. On appeal to this Court, the mother contends the evidence was insufficient. We have concluded the evidence in the record does not establish by clear and convincing evidence the requisite proof, that the child would more likely than not be exposed to a substantial risk of harm if left in the mother's care. We therefore, vacate and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Christine Zellar Church, Clarksville, Tennessee, for the appellant, T.L.J.R.

Sharon T. Massey, Clarksville, Tennessee, for the appellees, J.R.R and L.C.R.

OPINION

I.

On September 1, 1999, T.L.J.R. ("Mother") gave birth to a son ("child") who is the subject of this action. At the child's birth, she was married to the biological father, J.R. ("Father"). Mother and Father provided, at best, an unstable environment in which to raise a child. From the time the child was five days old, the child's paternal aunt and uncle ("Petitioners") routinely cared for the child when Mother and Father were unable to properly care for the child.[1] During the first three years of his life, the child was "bounced around," staying and living with various relatives, spending

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[1] Mother and Father were often unable to care for the child due to excessive drinking and partying.

the majority of time, when he was away from his parents, with Petitioners.[2] Due to the child's parents inability to consistently care for the child, Petitioners provided him with food, clothing, shelter, birthday parties at their home, and other needs, such as medical attention and parental nurturing.

Father and Mother separated in October of 2000, further complicating the raising of their young child. Mother moved from Stewart County and left the child in Petitioners' care, explaining to them that she would return in a few hours after picking up her other son. However, she did return to pick up the child. As a result, Father attempted to pick up the child from Petitioners' home, but due to his intoxication, Petitioners prevented the child from leaving their home. This type of incident was all too common in the child's early childhood. After this incident, the Petitioners primarily cared for the child.

Father filed for divorce from Mother in 2000 in the Chancery Court of Stewart County. In accordance with the agreed temporary parenting plan, Father served as the Primary Residential Parent of the child, and Mother was allowed supervised visits. At the time the temporary parenting plan was entered, Mother was living with another man, S.R. Later, in 2002, while cohabitating with Mother, S.R. was charged with the manufacture of methamphetamine, and Mother was charged with facilitation of the manufacture of methamphetamine.[3] The charges resulted in two years on probation for Mother and an eight year prison sentence for S.R.

Mother's life continued to be plagued with problems and setbacks. In December 2002, while driving with the child in the car, she was arrested and charged with driving under the influence, child endangerment, and a violation of the child restraint law. In early 2003, she pleaded guilty to driving under the influence and violating the child restraint law. The child endangerment charge was dismissed.[4] The DUI arrest led to a violation of the terms of her probation for facilitation of the manufacture of methamphetamine. As a result, Mother's probation was extended, and she was ordered to undergo a drug and alcohol assessment. The assessment determined that Mother would benefit from a twenty-eight day program.

Mother's probation officer, Mr. Parsons, testified that Mother admitted to having a drug and alcohol problem in 2002 and that she had not previously received treatment. Thereafter, Mr. Parsons administered numerous random drug screenings on Mother, all of which found no trace of drugs.

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[2] According to the record, Father and Mother lived next door to the Petitioners in Stewart County, Tennessee.

[3] There is contradictory evidence in the record that suggests the child was exposed to methamphetamine during a camping trip. Mother admits that methamphetamine was produced at the campsite; however, she testified that it was not in production when they were present.

[4] Mother pled guilty to the 2002 DUI in 2003. Since entering the plea, she has been unable due to her indigency to pay fines and court costs with regard to her DUI, for which she was found in violation of probation. In 2004, she was cited for driving on a revoked license without insurance.

Thus, after her 2002 conviction of facilitation, there is no evidence of any drug use by Mother. Further, Mr. Parsons considered Mother to be a "successful probationer."

In addition to Mother's problems with drugs and alcohol, Petitioners allege that the child was exposed to domestic violence. According to testimony at a February, 2005 custody hearing, Mother and Father were in the midst of a heated argument and engaged in a so-called "tug-of-war" over the child in 2002. Petitioners were present at the time of the argument and removed the child. After an examination of the record, the exact date of the argument is unclear, but according to the testimony of Petitioner (the aunt), she believed it took place in 2002.

In 2003, Mother was charged with domestic assault against her then boyfriend, E.P., with whom she was living. The charges were later dismissed. However, there was neither evidence introduced about the nature of the incident, nor was there any proof that the child was present.

In September of 2003, the child turned four years old, and Mother enrolled him in Headstart to prepare him for kindergarten. Later that year, the child arrived at Headstart with a mark across his neck. According to the testimony of Brenda Moller, the child's Headstart teacher, the child said that J.P., Mother's boyfriend at the time, strangled him, and, Ms. Moller reported the suspected abuse to the Department of Children's Services. According to the record, the Department took no action regarding the referral. A year later, in September 2004, Mother married J.P., the man with whom she had been living since February, 2004.

II.

Petitioners filed a dependent and neglect action seeking to gain custody of the then five-year old child in March of 2004. The Juvenile Court held a hearing in March 2004, wherein a Montgomery County law enforcement officer and Mother's probation officer testified, following which the court issued an Order of Reference instructing the Department of Children's Services to conduct an investigation. The Department recommended alternative placement for the child.

Seven months later, in February of 2005, the case was set for another hearing. At the close of that hearing, the Juvenile Court found the child dependent and neglected, removed him from Mother's custody, and placed him with the Petitioners. Mother appealed to the Circuit Court.

In July of 2005, the Circuit Court conducted a hearing. By stipulation of the parties, no witnesses were called to testify, and the Circuit Court considered only the transcribed testimony from the February 2005 hearing in the Juvenile Court.[5] After hearing oral arguments from attorneys and reviewing the transcript of evidence from the prior hearing, the Circuit Court determined that the

[5]After a careful review of the record and investigation into the trial exhibits' absence, we have come to the conclusion that the exhibits, to which both parties refer in their briefs, are not in the record before us. In addition, when reviewing the transcript and the record, it is assumed that the Circuit Court did not have the exhibits before it, either.

child was dependent and neglected pursuant to Tenn. Code Ann. § 37-1-102(b)(12) due to the child being exposed to domestic violence, and that Mother had not yet come to grips with her drug abuse. Based upon this finding, the Circuit Court removed the child from Mother's home and placed him in the custody of Petitioners.

Mother appeals contending: (1) the evidence presented preponderates against the trial court's findings of fact, such that these findings should not be given a presumption of correctness, (2) Petitioners failed to prove by clear and convincing evidence that the minor child faces a risk of substantial harm if left in Mother's custody, (3) Petitioners failed to prove by clear and convincing evidence any of the statutory bases to find a child "dependent and neglected," and (4) the court failed to consider less restrictive measures that removal of the minor child from his Mother and his older brother.[6]

III.

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). A parent's interest in the custody of a child is an established fundamental liberty, protected by both the United States Constitution, *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), and the Tennessee Constitution under Article I, Section 8. *Hawk*, 855 S.W.2d at 579. This right is superior to the claims of other persons and the government, yet it is not absolute. Courts have referred to this standard as the "superior parental rights" doctrine. *See Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002).

The applicable legal standards with regard to a custody dispute between a natural parent and a non-parent differ markedly from the applicable standards with regard to a custody dispute between two natural parents. *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). "[I]n a contest between a parent and non-parent, a parent cannot be deprived of the custody of a child unless there has been a finding, after notice required by due process, of substantial harm to the child." *In re Askew*, 993 S.W.2d 1, 4 (Tenn. 1999) (citing *Bond v. McKenzie*, 896 S.W.2d 546, 548 (Tenn. 1995)). It is not until after a showing of substantial harm has been made that the court will consider the best interests of the child. *Id*. "[D]ue to the constitutional protection afforded the biological parents, the non-biological parent has the burden of establishing by clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the biological parent." *Hall v. Bookout*, 87 S.W.3d 80, 86 (Tenn. 2002).

As this Court explained in *Means v. Ashby*, 130 S.W.3d 48, 57 (Tenn. Ct. App. 2003), there are two different standards and the aforementioned "superior parental rights" doctrine, requiring a showing of substantial harm, applies to cases involving an initial custody dispute between a parent

[6]Mother also contended the circuit court erred by not remanding the case to the juvenile court. That issue is mooted by our ruling and therefore is not discussed.

and a non-parent.[7] *Id*. Courts cannot award custody to a non-parent, a third party, instead of a parent "unless the third party can demonstrate that the child will be exposed to substantial harm if custody is awarded to the biological parent." *Ray*, 83 S.W.3d at 732.

The courts have not gone as far as defining what circumstances constitute "substantial harm" to a child. However, this Court, in *Ray*, provided some guidance to assist in the determination of the existence of "substantial harm" by stating:

> These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier "substantial" indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. [While] the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Ray, 83 S.W.3d at 732.

The burden of proof to make a showing of substantial harm is on the petitioners and must be proved by clear and convincing evidence. *Hall*, 87 S.W.3d at 86. The "clear and convincing evidence standard" is more exacting than the "preponderance of the evidence" standard, *see Santosky v. Kramer*, 455 U.S. 745, 766, (1982); *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), although it does not demand the certainty required by the "beyond a reasonable doubt" standard. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *Id*. The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *see Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *Brandon*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

IV.

A.

Mother contends on appeal that the evidence does not satisfy the clear and convincing evidentiary standard that the child would more likely than not be exposed to a substantial risk of

[7] However, if there exists a valid court order of custody at the time the parent attempts to regain custody of the child, the "substantial harm" standard does not apply. *See Means*, 130 S.W.3d at 57; *see also Blair*, 77 S.W.3d at 141. Rather, "the natural parent must prove a material chance in circumstances that would make a custody change in the child's best interest." *Id*.

harm if left in her custody. The Circuit Court found the child was dependent and neglected pursuant to Tenn. Code. Ann. § 37-1-102(b)(12), that the child was in danger because of the situation with Mother, and that it was necessary to remove the child from Mother's home to prevent a substantial risk of harm. The Circuit Court explained that its decision was based on two areas of concern:

> First, that the child has been exposed to significant domestic violence. Second, that the mother has not come to terms with her drug abuse. This court routinely hears testimony from drug addicts and is familiar with the addiction. The court saw numerous examples in the transcript where the child's mother was in denial about her addiction to drugs, which is not uncommon behavior for a drug addict.

The most substantial and serious evidence indicating that Mother may be a substantial risk of harm to the child pertained to acts and omissions that occurred more than two years prior to the custody hearing. In *Ray*, 83 S.W.3d at 734, this Court found that the natural parent's illegal drug use occurring *two years prior* to the hearing did "not appear to be an accurate predictor of his behavior [two years later] and thereafter." The Court reasoned:

> Custody decisions should not be used to punish parents for past misconduct or to award parents for exemplary behavior. *Rice v. Rice*, 983 S.W.2d 680, 683 (Tenn. Ct. App. 1998); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997); *Gaskill v. Gaskill*, 936 S.W.2d at 630. The courts understand that persons are able to turn their lives around, *see In re Askew*, 993 S.W.2d 1, 2 (Tenn.1999). Accordingly, custody decisions should focus on the parties' present and anticipated circumstances, *Hall v. Hall*, No. 01A01-9310-PB-00465, 1995 WL 316255, at *2 (Tenn. Ct. App. May 25, 1995), and on the parties' current fitness to be custodians of children. *See Elder v. Elder*, No. M1998-00935-COA-R3-CV, 2001 WL 1077961, at *2 (Tenn.Ct.App. Sept. 14, 2001); *Gorski v. Ragains*, No. 01A01-9710-GS-00597, 1999 WL 511451, at *3 (Tenn. Ct. App. July 21, 1999).
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> The courts may and should consider past conduct to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child. However, the consideration of past conduct must be tempered by the realization that the persons competing for custody, like other human beings, have their own virtues and vices. *Gaskill v. Gaskill*, 936 S.W.2d at 630.

Id. at 734.

In making a determination of parental fitness in *In re Crawford*, No. 02A01-9405-CH-00124, 1995 WL 72615, at *6 (Tenn. Ct. App. Feb. 22, 1995), the trial court found the parent unfit largely due to his alcohol abuse and inability to properly care for his child. On appeal, however, this court found the proof regarding the parent's fitness in the *six months* prior to trial preponderated against

the trial court's findings. *In re Crawford*,1995 WL 72615, at *6. As the Court noted, parents can turn their lives around. *Ray*, 83 S.W.3d at 734.

B.

The Circuit Court found that the child was subjected to a substantial risk of harm because Mother had "not come to terms with her drug abuse." The custody hearing in Circuit Court was held in 2005. In 2001, Mother was charged with facilitation of manufacturing methamphetamine. She pled guilty to the charge in 2002 and received two years of probation. Mother testified that she stopped using drugs at this time, and the last evidence of Mother's drug use was prior to her 2002 conviction. Since then, Mother has been on probation and has taken several random drug tests and passed all of them. Additionally, her probation officer considers Mother a successful probationer. During her testimony in court, Mother was asked whether she would pass a drug test at that present moment, and she replied affirmatively. We find no evidence in the record that contradicts her statements, nor do we find evidence that she has recently used or abused drugs since 2002.

In addition to drug abuse, we recognize that Mother faced problems with alcohol abuse in the past as evidenced from her DUI charges in December 2002. At the time of the arrest, the child was riding unrestrained in the vehicle. She was charged with child endangerment for failing to properly restrain the child in a car seat, but the charge was later dropped. As a result, she plead guilty to DUI and child restraint. Since the DUI, Mother's drinking habits have changed. Due to her Hepatitis C, Mother claims that she does not drink alcohol except for an occasional beer. We find no evidence to the contrary upon a review of the record. Thus, the last evidence of alcohol abuse occurred in December of 2002.

This case pits two non-parents against a parent over the custody of the parent's child. Therefore, Petitioners, as non-parents battling a parent over the custody of a child, have the burden of establishing by clear and convincing evidence that the child will be exposed to a substantial risk of harm if left in the custody of Mother. *See Hall*, 87 S.W.3d at 86. As we stated earlier, a "substantial risk of harm" indicates two things: a real hazard or danger that is not minor, trivial, or insignificant; and the harm must be more than a theoretical possibility. *Ray*, 83 S.W.3d at 734. In determining the risk of harm, courts should consider past conduct "to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child." *Id*. The consideration of past conduct, however, must be tempered and while the harm need not be inevitable, "it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not." *Id*.

Although courts may and should consider past conduct to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child, the consideration of past conduct may be tempered by considering, *inter alia*, the nature and severity of the past conduct in relation to the welfare of the child, when the conduct occurred, and what remedial actions, if any, the parent has taken. Here, the last evidence of a substantial risk of harm to the child was Mother's DUI in December, 2002. Although she has

experienced more current problems, such as her violation of probation for failing to pay required fines and costs, and her arrest for driving on a revoked license with no insurance in 2004, these violations do not constitute a substantial risk of harm to the child.

It is undisputed that Mother has had her share of problems, some more severe than others, which could serve as the basis for a finding of dependency and neglect; however, the existence of Mother's substantial risk of harm to the child must be measured at times relevant to the custody determination, especially when the record indicates Mother made changes in her life. We therefore conclude, as the court did in *Ray*, the evidence of Mother's alcohol and drug problems more than two years ago fails to satisfy the clear and convincing evidentiary standard that the child would more likely than not have been exposed to a substantial risk of harm in Mother's custody.[8] Accordingly, Petitioners failed to carry the burden of proof with respect to the claims of alcohol and drug abuse.

C.

The Circuit Court additionally found that the child was subjected to a substantial risk of harm by being exposed to domestic violence. The record confirms the child was exposed to varying degrees of domestic incidents, including Mother's "tug-o-war" with E.P. The domestic incidents to which the child was exposed may have provided sufficient evidence to establish a substantial risk of harm to the child if the incidents had been more severe or more current, *see Ray*, 83 S.W.3d at 736; however, the most recent domestic incident in the record occurred in 2002, more than two years prior to the custody hearing in 2005. We therefore conclude that the evidence of domestic incidents in the record fails to satisfy the clear and convincing evidentiary standard that the child would more likely than not have been exposed to a substantial risk of harm in Mother's custody. Accordingly, Petitioners failed to carry the burden of proof with respect to the claims of domestic violence.

V.

The record before us does not satisfy the clear and convincing evidentiary standard necessary to establish that the child, if left in Mother's care at the time of the custody hearing in 2005, would more likely than not have been exposed to a substantial risk of harm. Accordingly, the judgment of the Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion. The costs of appeal are assessed against Petitioners.

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FRANK G. CLEMENT, JR., JUDGE

[8] We recognize that Mother may or may not have current problems that are not evidenced by this record; however, the record before us does not contain evidence of such problems, and we are limited to the evidence in this record. If she has problems that have arisen or re-occurred since the custody hearing in 2005 that more likely than not will pose a substantial risk of harm to the child, these matters can be addressed in a new petition to determine whether Mother should or should not have custody of the child presently.